

STATE OF MICHIGAN
COURT OF APPEALS

In re WILLIAMS, Minors.

UNPUBLISHED
September 15, 2016

No. 329636
Wayne Circuit Court
Family Division
LC No. 15-520166-NA

Before: GADOLA, P.J., and WILDER and METER, JJ.

PER CURIAM.

Respondent-father P. Williams appeals as of right the circuit court's order terminating his parental rights to two minor children. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Respondent admitted physically abusing his girlfriend's minor son, AB. A safety plan was put into place, a condition of which was that respondent not be left alone with the children. That plan was violated and respondent's daughter was severely injured while in respondent's care. Petitioner sought termination of respondent's parental rights to his children under §§ 19b(3)(b)(i), (g), and (j). Respondent agreed to plead no contest to the allegations in the petition, for purposes of both jurisdiction and the statutory grounds for termination. He also agreed that the petition could serve as the factual basis for his plea, apparently meaning that the allegations therein could be accepted as true without an express admission from respondent that they were true, or the necessity of petitioner proving those allegations by independent evidence.

A referee found that the allegations in the petition, when taken as true, supported the assumption of jurisdiction over the children and termination under § 19b(3)(b)(i), but not under §§ 19b(3)(g) or (j). The referee later held a dispositional hearing and found that termination of respondent's parental rights was in the children's best interests. Pursuant to the referee's recommendation, the trial court entered an order terminating respondent's parental rights. The court's order indicated that grounds for terminating respondent's parental rights existed pursuant to §§ 19b(3)(b)(i), (g), (j), and (k)(iv).

After respondent filed his claim of appeal, on petitioner's motion, this Court remanded the case to the trial court "for further development of the record with respect to the factual basis for both the trial court's acceptance of respondent-appellant's no contest plea under MCR 3.971(C)(2) and the termination of respondent-appellant's parental rights." *In re Williams*

Minors, unpublished order of the Court of Appeals, entered May 4, 2016 (Docket No. 329636). In response, the trial court issued a written opinion finding that the allegations in the petition, when taken as true, established a basis for the assumption of jurisdiction under MCL 712A.2(b)(1) and (2), and a basis for the termination of respondent's parental rights under §§ 19b(3)(b)(i), (g), (j), and (k)(iv). The opinion concluded with the following:

Based on the sworn testimony, weighing the credibility of the witnesses [sic] testimony, and the court records in this matter, the court finds the material allegation in the petition substantiated and determines by clear and convincing evidence that the children would be abused in the long term future and recommends that the parental rights of the father . . . be terminated in accordance with MCL 712A.19b(3)(b)(ii).

II. PLEA PROCEEDINGS

Respondent's first issue concerns both the validity of the plea procedure and the allegedly confusing nature of the court's rulings when read in conjunction with the referee's findings. The issue regarding the plea procedure has not been preserved for appeal because respondent did not challenge the validity or adequacy of the plea in the trial court. *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). Therefore, review is limited to ascertaining whether plain error occurred that affected respondent's substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

The essence of respondent's claim regarding the plea procedure is that because he entered a no-contest plea, other evidence supporting the allegations in the petition had to be used to provide a factual basis for the plea, see MCR 3.971(C)(2), and such evidence must have been legally admissible, see MCR 3.977(E)(3). The fact remains, however, that respondent and his attorney both agreed to use the petition to establish the factual basis for the no-contest plea. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). Similarly, a party may not claim error regarding an issue on appeal to which his lawyer acquiesced in the trial court. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). In such cases, the issue is waived and there is no error. *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000). Accordingly, respondent may not now challenge the use of the allegations in the petition to establish a factual basis for his plea.

We agree with respondent that the trial court's orders are inconsistent with the referee's ruling at the plea proceeding. The reference to §§ 19b(3)(g) and (j) in the court's order appears attributable to the fact that the referee also terminated the parental rights of AB's father under §§ 19b(3)(a)(ii), (g), and (j), and recommended the termination of both fathers' parental rights under §§ 19b(3)(a)(ii), (b)(i), (g), (j), and (k)(iv), without specifying which grounds applied to which father. It also appears, from context, that the referee sua sponte found an additional basis for termination of respondent's parental rights under § 19b(3)(k)(iv), following the dispositional hearing. Finally, it appears that the court's reference to § 19b(3)(b)(ii) was a clerical error because that subsection only applies to a parent who failed to prevent injury or abuse inflicted by another, and the petition did not allege that anyone other than respondent had injured or abused a

child. As explained herein, however, these apparent errors do not preclude review of respondent's remaining substantive issues.

III. STATUTORY GROUNDS FOR TERMINATION

Respondent challenges the trial court's determination of the statutory grounds for termination. Because respondent pleaded no contest to the existence of a statutory ground for termination under § 19b(3)(b)(i), the appropriate inquiry is whether there was a sufficient factual basis to support the plea. In the criminal context, "[a] factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference." *People v Jones*, 190 Mich App 509, 511-512; 476 NW2d 646 (1991) (citation omitted).

Because of the parties' plea agreement, respondent did not make any admissions, but he agreed not to contest the allegations in the petition. Those allegations showed that respondent was a violent person, as evidenced by his history of domestic violence and his admitted physical abuse of AB, which resulted in injury to AB, a sibling of the minor children. Respondent's daughter, CW, suffered a serious injury to her eye while she was in respondent's custody. The injury was not consistent with respondent's explanation, and respondent instructed AB not to tell the truth if asked about the incident. This evidence supports an inculpatory inference that respondent caused the injury to CW's eye. In addition, evidence that respondent physically injured two children in his care at two different times, coupled with his propensity for violence and his affirmative efforts to cover up his actions, support an inference that the children were likely to be injured or abused if placed in respondent's home. Accordingly, the allegations in the petition provided a factual basis for respondent's plea pursuant to § 19b(3)(b)(i). Because only one statutory ground need be established, *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012), we need not address the propriety of the trial court's determination regarding § 19b(3)(k)(iv) or any other ground that the trial court might have thought applicable.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that he was denied his right to the effective assistance of counsel because his attorney did not call any witnesses or present other evidence and "made minimal effort to cross-examine petitioner's witnesses" at the dispositional hearing. A respondent in child protective proceedings has a due process and equal protection right to counsel. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). This includes the right to effective assistance of counsel. *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App at 598.

Because respondent did not raise this issue in the trial court by way of a motion for an evidentiary hearing or other relief, our review of this issue is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim of ineffective assistance of counsel, respondent must "show both that counsel's performance fell below objective standards

of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). However, the trial strategy must be sound, and "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Therefore, counsel may be found ineffective with regard to a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). Counsel will be found ineffective for the failure to call or cross-examine witnesses or to present other evidence only if the omission deprived the defendant of a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that respondent and his girlfriend were both present for the hearing, as was respondent's employer, Conrad Brudham. Michael and Lori Kitchen, the foster parents of AB and one of respondent's children, and Ken Buschel, their foster grandfather, were also present. Respondent's counsel anticipated calling respondent and Brudham, but ultimately did not call any witnesses. Respondent's evaluation from the Clinic for Child Study was the only exhibit admitted into evidence with respect to the petition against respondent. The record does not show what testimony any of the witnesses would have offered if called. Nor has respondent identified what other evidence counsel should have offered or what information he should have elicited from petitioner's witnesses during cross-examination. Having failed to provide an appropriate offer of proof showing what testimony or evidence counsel could have presented, respondent has not shown that counsel's omissions deprived him of a substantial defense.

Respondent also contends that counsel was ineffective for failing "to object to the court making jurisdictional findings based on mere allegations." To the extent it was error for counsel to stipulate to the use of the petition as a factual basis for respondent's plea, respondent has not shown that he was prejudiced by the error. Respondent never challenged jurisdiction and his attorney even argued at the dispositional hearing that "the more proper thing to do here is to take temporary wardship" of the children. Further, respondent has not shown a reasonable probability that the court would have declined to exercise jurisdiction over the children had petitioner presented evidence supporting the allegations in the petition.

Respondent also contends that counsel was ineffective for failing "to timely object to the trial court essentially conducting a jurisdictional trial at the best interest hearing." This is a mischaracterization of the proceedings. The referee took jurisdiction over the children based on respondent's plea. She simply incorporated her prior determination in her written recommendation at the conclusion of the proceedings. See, generally, MCR 3.913(A)(1). Accordingly, there was no reason for counsel to object on this basis.

Respondent lastly contends that counsel was ineffective for failing "to make any meaningful challenge to any of the allegations in the petition." Given that respondent agreed not

to contest the allegations in the petition, or disagree that those allegations, when taken as true, established both a statutory basis for the assumption of jurisdiction and for termination of parental rights, counsel had no reason to challenge them.

For these reasons, the record does not support a finding that respondent's counsel was ineffective.

V. BEST INTERESTS

Respondent lastly argues that the trial court erred in its best-interests determination. Even where a statutory ground for termination exists, the court cannot order termination of parental rights unless it also finds that termination of parental rights is in the child's best interests. MCL 712A.19b(5); MCR 3.977(E)(4). The trial court's decision regarding the child's best interests is reviewed for clear error. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014); MCR 3.977(K).

Respondent physically abused and injured AB, a child in his custody. In addition, respondent's daughter was severely injured under suspicious circumstances while in his care. Respondent did not seek immediate medical treatment for the severe injury, even though the child's eye was bleeding, and provided a possible explanation that was inconsistent with the nature of the injury. According to the clinic evaluation, respondent's son suffered from "night terrors" after family visits. A child protective services worker opined that it was in the children's best interests to terminate respondent's parental rights because, among other things, he had "limited parenting skills . . . to keep the children safe." The trial court did not clearly err in finding by a preponderance of the evidence that termination of respondent's parental was in the children's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

Affirmed.

/s/ Michael F. Gadola
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter